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No. 06-65

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

NATHANIEL RICHMOND and
STEPHANIE RICHMOND,

Petitioners,

v.

NICHOLAS G. HIGGINS, d/b/a
NICHOLAS G. HIGGINS & ASSOCIATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Does the Eighth Circuit's decision in this case conflict with *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995), such that issuance of a Writ of Certiorari is warranted when the predicate facts of the two cases are distinctly different, as are the issues of law?

PARTIES TO THE PROCEEDINGS

Petitioners are Nathaniel Richmond and Stephanie Richmond. Respondent is Nicholas G. Higgins, d/b/a Nicholas G. Higgins & Associates.

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COUNTERSTATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Nathaniel Richmond was injured in an automobile accident and treated at Barnes-Jewish Hospital ("BJH") in June 2001. *See Richmond v. Higgins*, 435 F.3d 825, 826 (8th Cir. 2006). The charges for the medical services rendered by BJH were never paid, either by Mr. Richmond, by an insurance company or by Medicaid. Mr. Richmond retained Attorney John Albright ("Albright") to represent him in his personal injury action against the other driver. *Id.* In October 2001, Albright requested a copy of Petitioner's unpaid bill and medical records from BJH. *Id.* at 827. On November 5, 2001, BJH provided the requested materials, which showed an outstanding balance of $6,716.40. *Id.* In January, February, and April of 2002, BJH contacted Albright regarding the outstanding balance on Petitioner's account. *Id.* Each time Albright informed BJH that Petitioner was attempting to settle the personal injury action and asked BJH to call back in a few weeks, but he did not challenge the validity or the amount of the debt. *Id.*

In October of 2002, BJH forwarded Petitioner's still unpaid account to Respondent Nicholas Higgins for collection. *Id.* On October 9, 2002, Respondent sent a notice of hospital lien letter to Albright referencing Petitioner, BJH, and the outstanding debt amount of $6,716.40. *Id.* As required by the FDCPA, 15 U.S.C. § 1692g(a)(4), the letter stated that failure to notify Respondent within thirty days of receipt of the letter of any dispute regarding the validity of the debt would result in an assumption that the debt was valid. *Id.* Albright never responded to the October 9, 2002 letter. On February 13, 2003, Respondent sent a second letter to Albright requesting a status report on

Richmond's personal injury claim. *Id.* Albright responded to the February 13 letter on April 1, 2003, alleging for the first time that Respondent had misstated the amount of the debt because federal Medicaid law prohibited BJH and Respondent from collecting an amount exceeding the amount Medicaid would pay. *Id.* On April 9, 2003, Albright sent Respondent another letter stating that he could not "find any way to enforce 42 U.S.C. § 1396a(a)(25)(C) & (D) against medical providers other than through the [FDCPA]." *Id.*

Petitioners' personal injury lawsuit settled on August 9, 2003. On September 30, 2003, Respondent wrote to Albright requesting that they discuss payment arrangements, otherwise BJH would reduce its claim to judgment. *Id.* On October 6, 2003, Petitioners sued Respondent in federal district court alleging that Respondent violated the FDCPA by misstating the debt amount. *Id.*

II. TRIAL COURT PROCEEDINGS

After Petitioners filed suit in the United States District Court for the Eastern District of Missouri, Respondent filed an initial Motion for Summary Judgment, arguing that Respondent was entitled to rely on the hospital's representations as to the amount of the debt, and that the focus of the FDCPA is on the conduct of the debt collector, not the amount of the debt. Respondent then filed a Second Motion for Summary Judgment, arguing that the FDCPA does not apply to letters to a consumer's attorney, as in this case. Petitioners then filed their own Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment as to Liability.

The District Court granted Respondent's Second Motion for Summary Judgment and denied Plaintiff's Motion For Summary Judgment, or in the alternative, Motion for Partial Summary Judgment as to Liability. Having granted Respondent's Second Motion for Summary Judgment, the District Court denied as moot Respondent's initial Motion for Summary Judgment and dismissed the action with prejudice. In an unpublished opinion, the District Court held that communications to a consumer's attorney are not actionable under the FDCPA, reasoning that to hold otherwise would essentially equate consumers with their attorneys and negate Congress' intent to protect the uninformed or naive consumer.

III. THE DECISION BELOW

On appeal to the Eighth Circuit Court of Appeals, Petitioners argued that the FDCPA applies to communications between a debt collector and a consumer's attorney. Respondent argued that the District Court's grant of summary judgment should be affirmed because the FDCPA does not apply to communications between a debt collector and a consumer's attorney. Respondent also argued that the record supported two additional independent bases for sustaining the grant of summary judgment. Respondent argued that he was entitled to rely on the hospital's representations as to the amount of the debt and that the debt was not in fact misstated or overstated.

The Eighth Circuit Court of Appeals affirmed the decision of the District Court, but not for the reasons stated in the District Court's opinion. *Richmond v. Higgins*, 435 F.3d 825, 829 (8th Cir. 2006). The Eighth Circuit began by noting that Petitioners' attorney Albright failed

to dispute the debt within the thirty-day time frame allotted by the FDCPA despite proper notice by Respondent that he had the right to do so. *Id.* at 827. The Eighth Circuit found that Petitioner Nathaniel Richmond never alleged that he was billed for services that were not provided or that he was overcharged for services received. *Id.* at 829. The Court further found that the conduct alleged to have violated the FDCPA was merely Respondent's attempt to collect a previously undisputed amount. *Id.* The Court's specific holding was stated as follows:

> [Petitioner] was aware of the debt amount for almost a year before the debt was sent to [Respondent] for collection. There is nothing in the record to show that the basis for the dispute did not exist prior to April 1, 2003. Having carefully reviewed the record and the text and legislative history of the FDCPA, we can ascertain no basis for a claim in these circumstances. To hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate. We hold that there was no violation of the FDCPA, and therefore we affirm the district court's grant of summary judgment.

Id.

Petitioners then filed a Motion for Rehearing and Rehearing En Banc, which was denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Eighth Circuit ascertained that the debtor filed this FDCPA action just to dispute a debt. *Higgins*, 435 F.3d at 829. The debtor never alleged that he was billed for services that were not provided or that he was overcharged for the

services he received. *Id.* The Eighth Circuit recognized that the conduct challenged by the debtor was the debt collector's attempt to collect a previously undisputed debt amount. *Id.* The Eighth Circuit correctly held that, according to the text and legislative history of the FDCPA, there was no basis for a claim in these circumstances, and to hold otherwise would be to sanction consumer conduct that the FDCPA clearly did not contemplate. *Id.* The Eighth Circuit correctly ruled for Respondent. The Petition for Writ of Certiorari should be denied.

I. *HEINTZ V. JENKINS* DISTINGUISHED

Petitioners ostensibly seek a Writ of Certiorari from this Court on the basis that the Eighth Circuit's decision is in conflict with *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995). Petitioners attempt to confuse the Court by claiming that the case at hand is "indistinguishable" from *Heintz* and that the Eighth Circuit's decision conflicts with the holding in *Heintz*.

Heintz involved a foreclosure on an automobile sales contract, wherein the bank (creditor) hired a lawyer to bring suit against the debtor for the deficiency after the sale. *See Jenkins v. Heintz*, 124 F.3d 824, 826 (7th Cir. 1997). The balance included unauthorized charges for force placed insurance. *Id.* at 827. A lawsuit was filed by Heintz, the debt collector, upon a deficiency balance. The allegedly offensive letter that prompted the FDCPA suit was mailed almost a month after the suit was filed. *Id.* As in this case, debtor failed to seek validation of the debt in the interim. *Id.* Moreover, and most importantly, the FDCPA suit against Heintz was in fact dismissed, despite Petitioners' claims, because the Seventh Circuit found, on

remand, that the debtor did not present evidence from which a jury could reasonably conclude that the debt collector knew of the unauthorized nature of the force placed insurance or that he intentionally falsely represented the character of the debt. *Id.* at 835.

This case involves a different fact pattern, and the decision of the Eighth Circuit based upon those facts presents no conflict with *Heintz*. Here, a consumer (Richmond) sought medical treatment from the creditor, a hospital, after suffering injuries from an automobile accident caused by a third party. At the time medical service was sought, the third party's insurance information was given by the consumer to the hospital. The hospital billed for the amount due for the services rendered. Four months later, the debtor's attorney requested the medical bills of debtor, for the purpose of using them to establish debtor's damages in the personal injury action against the third party who was liable for the automobile accident. The hospital sent the medical bills to debtor's attorney, who was then aware of the debt amount. The hospital contacted debtor's attorney on three separate occasions over the following five-month period. Debtor's attorney did not dispute the debt at anytime during any of those conversations. The debt was not turned over to Respondent, the debt collector, until six months later. The debt collector then sent a debt collection notice to debtor's attorney, who did not dispute the debt amount within thirty days of receipt of that letter. In fact, the debt collector did not receive notice that the debt was in dispute until almost six months after he sent the debt collection notice. As the Eighth Circuit observed, the debt collector was permitted under the FDCPA to assume that the debt was valid. *Higgins*, 435 F.3d at 829; *see also* 15 U.S.C.

§ 1692g(a)(3). In the year and five months between the date that debtor's attorney was first informed of the debt amount until he first disputed the debt amount, the amount never changed. What is obvious is the fact that the debtor's attorney refrained from disputing the debt until after the debtor's personal injury action against the liable third party was settled.

The legal issues in this case also differ from those in *Heintz*. The issue before this Honorable Court in *Heintz* was whether the term "debt collector" in the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§1692-1692*o* (1988 ed. and Supp. V), applied to a lawyer who "regularly," *through litigation*, tries to collect consumer debts. *Heintz,* 514 U.S. at 292, 115 S. Ct. at 1490. The legal issues upon remand centered upon whether an attorney could be held liable for violating the FDCPA by intentionally attempting to collect, on a bank's behalf, a debt that included unauthorized premiums for force placed insurance, given the absence of evidence that the attorney knew that the premiums were unauthorized, and then made a false representation as to the character of the debt. *Heintz*, 124 F.3d at 831-832.

The Eighth Circuit's decision in this case is correct and does not conflict with this Court's decision in *Heintz*. The Eighth Circuit's decision represents resolution of a factual issue rather than an important question of federal law. The Eighth Circuit correctly determined that pursuant to the facts of this case, Respondent could not be held liable for a violation of the FDCPA.

In their attempt to rebut the Eighth Circuit's holding, Petitioners also cite to *Arkansas Dept. of Health and Human Services v. Ahlborn*, ___ U.S. ___, 126 S.Ct. 1752

(2006), *Mallo v. Public Health Trust of Dade Co., Fla..*, 88 F. Supp.2d 1376 (S.D. Fla. 2000), and *Spectrum Health Continuing Care Group v. Anna Marie Bolling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005). *Mallo* and *Spectrum*, however, are inapposite. Both of those cases dealt with the prohibition against "balance billing" after Medicaid had already paid the healthcare provider. "Balance billing" occurs when a hospital attempts to collect from a patient additional money for its services *after* it has been paid by Medicaid. Here, it is undisputed that no "balance billing" occurred.

Ahlborn is also inapplicable. The issue this Court considered in *Ahlborn* was the validity of an Arkansas statute which automatically imposed a lien in favor of the state's Department of Human Services on tort settlement proceeds to reimburse it for Medicaid payments made on behalf of the recipient. *Ahlborn*, 126 S.Ct. at 1755. Here, payments were never made by Medicaid to the creditor for services rendered to Mr. Richmond.

Petitioners cannot demonstrate the existence of any conflict with *Heintz* or a Circuit split of authority. Petitioners alleged below that Respondent violated the FDCPA in sending letters to Petitioners' attorney. Neither Petitioners, nor their attorney, disputed the amount of the debt within the thirty-day time frame contemplated. As the Eighth Circuit found, Respondent was therefore permitted to assume the debt was valid. *Ergo*, the letters, which Petitioners allege violated the FDCPA, were an attempt to collect a presumptively valid debt, per the language of the FDCPA. The FDCPA does not provide for an action in such situations.

II. THE IMAGINARY FELONY

Petitioners' attempt to show a violation of the FDCPA based on the operation of a Medicaid statute is illogical and unfounded. Petitioners allege that seeking payment in excess of Medicaid's rates from a patient covered by Medicaid is a felony. The issue of whether a felony was committed is irrelevant to this case, and even if it were relevant, as explained *infra*, any alleged felony cannot be imputed to Respondent.

Petitioners cite to 42 U.S.C. § 1320a-7b(d)(1), *Spectrum Health Continuing Care Group v. Anna Marie Bolling Irrevocable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005) and 42 U.S.C. § 1396a(a)(25)(C) to support their contention. Petitioners misinterpret 42 U.S.C. § 1320a-7b(d)(1). Petitioners overlook the plain language of the statute, which requires that the services be provided "under the plan"; i.e., that the provider must accept Medicaid as payment in order for liability to attach for charging in excess of the state plan. The statute states that a provider cannot charge "*for any services provided to a patient under a State plan*" in excess of what the plan allows. Thus, the services must have been provided "under a State plan." However, the creditor in this case, the hospital, did not provide its services "under a State plan." Rather, it opted to bill the patient directly instead of seeking Medicaid payment. This statute contemplates the classic "balance billing" cases as identified above, which did not occur in this case. Therefore, Petitioners' interpretation of this statute and its application to the instant case is erroneous.

Spectrum is also distinguishable from the underlying case. *Spectrum* involved a hospital which attempted to

collect from a patient additional money for its services *after* it had been paid by Medicaid (also known as "balance-billing"). *Spectrum*, 410 F.3d at 308-309. Here, the hospital was never paid by Medicaid for services rendered to Mr. Richmond. Petitioners' reliance on *Spectrum* is without merit.

Petitioners' allegation of Respondent's commission of a felony is a desperate endeavor to confuse the very simple factual and legal issues involved in these proceedings and divert attention from Petitioners and their attorney's failure to timely dispute the debt as allowed for in the Act. Petitioners did not allege any violation of 42 U.S.C. § 1320a-7b(d)(1) in their Complaint, and only raised this issue for the first time in Petitioners' Reply to Respondent's Response in Opposition to Plaintiff's Motion for Summary Judgment in the District Court. Petitioner's allegations with respect to 42 U.S.C. § 1320a-7b(d)(1) amount to no more than a "smoke and mirrors" game intended to confuse the issues in pleadings to reviewing courts.

III. ANY ALLEGED FELONY CANNOT BE IMPUTED TO RESPONDENT

Assuming, *arguendo*, that the hospital (the creditor) did commit a felony by charging an amount that was not allowed by law under the Medicaid statute, the felonious act cannot be imputed to Respondent. As a matter of law, attorneys and debt collectors are entitled to rely on the information they receive from creditors and they are not held strictly liable when they mistakenly attempt to collect amounts in excess of what is due, if they reasonably relied on information provided by their clients. *Smith v. Transworld*

Systems, Inc., 953 F.2d 1025, 1032 (6th Cir. 1992); *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 462 (M.D. La. 1996); *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir. 1997); *Jenkins v. Union Corp.*, 999 F. Supp. 1120, 1140-1141 (N.D. Ill. 1998); *Amond v. Brincefield, Hartnett & Associates, P.C.*, 175 F.3d 1013 (4th Cir. 1999).

Under the FDCPA, "[a] purported debtor's dispute of the existence or amount of a debt does not require a debt collector to independently investigate the alleged debt, because a debt collector is entitled to rely on the creditor's representation that the debt is valid." *Clark v. Capital Credit & Collection Services, Inc.*, 2004 WL 1305326 at *10 (D. Or. January 23, 2004) (*citing Bleich v. The Revenue Maximization Group, Inc.*, 233 F. Supp.2d 496, 500 (E.D.N.Y. 2002)); *see also Howe v. Reader's Digest Association, Inc.*, 686 F. Supp. 461, 467 (S.D.N.Y 1988) (a debt collector may reasonably rely on the accuracy of information provided by a creditor); *Smith*, 953 F.2d at 1032 (FDCPA does not require independent investigation of debt referred for collection); *Ducrest*, 931 F.Supp. at 462 (FDCPA does not require independent investigation of information provided by clients, or require debt collector to dispute creditor's construction of a contract.)

In the underlying case, Respondent was given a complete copy of Mr. Richmond's past due medical bill. Respondent was entitled to rely on this information, and furthermore had no duty to investigate whether Mr. Richmond was a Medicaid recipient at the time of the treatment.

The *Clark* decision, cited above, is instructive. In *Clark*, the plaintiffs argued that the defendants, including the creditor's attorney, violated the FDCPA by seeking to

collect a debt for medical treatment that was "either paid by insurance, subject to preconditions for collection, unpaid as a result of billing and insurance claims practices, not supported by billing to permit plaintiffs to make claims for insurance coverage and/or could not be verified to permit voluntary payment of a verified amount." *Id.* at *9. The court held that the attorney who acted as a debt collector for the creditors:

> was not required to examine the underlying documents concerning [plaintiff's] insurance coverage, the assignment of her debt . . . or other legal issues that might affect the legal status of the debt in question, or to calculate the charges and insurance reimbursements to determine if the amount of the verified debt was correct.

Id. at *10. The court also held that the defendant's status as an attorney did not obligate him to perform an independent legal analysis of the creditor's claim. *Id.* (*citing Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir. 1997)). The court held that "[i]t was enough that he confirm that the creditor was seeking compensation for services performed, and that the creditor was seeking the amount he was attempting to collect." *Id.*

Petitioners attempt to downplay their failure to timely dispute the debt by making erroneous allegations that the debt collector in this case should be imputed with its clients' alleged knowing and willful violations of a Medicaid statute. However, in *Randolph v. IBMS*, 368 F.3d 726 (7th Cir. 2004), Judge Easterbrook eloquently wrote:

> Courts do not impute to debt collectors other information that may be in creditor's files – for example, that a debt has been paid or was bogus to start with. This is why debt collectors send out

> notices informing debtors of their entitlement to require verification and to contest claims. [citation omitted]. Verification would be unnecessary if debt collectors were charged with the creditor's knowledge.

Id. at 729 (emphasis added).

Petitioners, however, neither contested the debt nor asked for verification until a year and five months after notice of the debt was first sent. Petitioners' attorney admits in his Petition for a Writ of Certiorari that he had "no motivation" to review his client's medical bill and dispute the debt "until it seemed likely the tort claim [personal injury claim] would bear fruit." Petition, p. 9. The FDCPA sets forth a detailed procedure for disputing the validity of a debt. The consumer has the immediate opportunity to dispute the debt and, upon the making of a request for debt verification, all collection efforts must cease. *See* 15 U.S.C. § 1692g(a). This debt validation procedure must be clearly communicated to the consumer and courts are loathe to allow debt collectors to vary from, or contradict, the statutory notification. *Russell v. Equifax*, 74 F.3d 30, 34 (2d Cir. 1996).

Respondent's October 9, 2002 letter to Petitioners' attorney, Albright, contained a proper validation notice. However, Petitioners and their attorney, Albright, chose to ignore the debt validation procedure. As the Eighth Circuit correctly found, since Petitioners failed to timely dispute the debt pursuant to debt validation and dispute provisions of the Act, Respondent "was permitted under the FDCPA to assume the debt was valid." *See* § 1692g(a)(3).

CONCLUSION

Respondent agrees with Petitioners' statement that "[c]omplying with the [FDCPA] is simple." Petitioners, as the Eighth Circuit reasoned, had the right under the Act to dispute the debt within thirty days of receipt of the notice. *See* 15 U.S.C. § 1692g(a)(3). When the Petitioners failed to dispute the debt within that thirty-day period, Respondent had the right to assume that the debt was valid. *Id.* As the Eighth Circuit correctly found, Petitioners failed to timely dispute the debt, therefore Respondent was permitted under the Act to assume that the debt was valid. *Higgins*, 435 F.3d at 829. This case is a factual issue case rather than an important question of federal law. The Eighth Circuit correctly determined that pursuant to the facts of this case, Respondent could not be held liable for a violation of the FDCPA.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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